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Chapter CLXIX.

GENERAL ELECTION CASES, 1917 TO 1920.

144. The Michigan election case of Beakes v. Bacon in the Sixty-fifth Congress.

Statutes prescribing methods of preservation of ballots are directory merely and it is sufficient if ballots have been so preserved as to furnish satisfactory evidence of the will of the voters.

An official return shown to be erroneous and incapable of correction ought to be rejected in entirety.

An unofficial recount, the correctness of which is not disputed, displaces the original return.

According to the precedents of the House of Representatives, official returns may be invalidated only in event of fraud in conducting the election, or want of authority in the election board, or irregularities rendering the result uncertain.

On October 5, 1917,[1] Mr. Walter A. Watson, of Virginia, from the Committee on Elections No. 3, submitted the report in the case of Samuel W. Beakes *v.* Mark R. Bacon from the second district of Michigan.

The record in this case is rather unique in that no unworthy motive is ascribed and there is no conflict of evidence.

The origin of the contest is explained in the report:

> The official returns of the election for Congress, November 7, 1916, gave Bacon 27,182, Beakes 27,133—a majority of 49 for Bacon.
>
> Reviewing the returns from the various precincts, contestant discovered that at first precinct, second ward, city of Jackson, he had run far behind the other candidates of his party, State and Federal; and unaware of any local sentiment or condition to produce such a result, he instituted unofficial inquiries to ascertain the cause. As the returns did not indicate that the contestee had polled any more votes there than the rest of his party ticket, it was obvious that the lost votes had not gone to his competitor. The matter became the subject of public discussion and of press comment, and a very general impression got abroad that a mistake had been made in the official count. Some of the election inspectors themselves concluded they had made a mistake. And when, two weeks later, the board of county canvassers met to canvass the returns, four of the inspectors who held this election sent to the board a written statement saying that, in compiling the vote for

[1] First session Sixty-fifth Congress, House Report No. 194, Record, p. 7842.

Congress, they had inadvertently failed to include 70 or more votes, and that therefore their return was wrong and did not reflect the true state of that poll.

Contestant, from this disclosure, believing a mistake had been made large enough to affect the result in the whole district, thereupon retained counsel to appear before the board and obtain a correction of the error, or, if this were not possible, a recount of the vote. In these proceedings contestee was likewise represented by counsel.

At this juncture the board, on the application of one of the candidates for the office of coroner, voted for at same election, opened the boxes of this precinct and directed a recount of the ballots. Counsel for both of the parties to this contest being present, they concluded to examine unofficially the vote for Congress as the recount for coroner progressed, and in this way it was ascertained that, as the ballots then stood, the contestant was entitled to 87 votes more than the official returns had given him.

Application was then made to the board on the part of the contestant to correct the error, or award a recount. That a mistake had been made was openly acknowledged by counsel for contestee and conceded by the board (Rec., 50–62); but, deeming its functions to be only ministerial the board felt unable to correct the returns and found no provision in the statute authorizing itself to hold a recount in case of a Federal office. Application was then made to the State board of canvassers for a recount of the vote, but with like result. The supreme court was then asked for a mandamus, compelling a recount, but refused to award the writ. The laws of his State seeming to afford no remedy for a situation like this, contestant then determined to bring the matter before this House for decision upon its merits.

The State law, while providing for a recount of the ballots in the election of State offices, made no provision for such proceeding where Federal offices were involved. However, by agreement of counsel, the ballot boxes were produced before a notary and practically the entire district was recounted.

This recount made it apparent that serious errors had been made in the official count, and it was generally conceded that the official returns were erroneous. When the board of canvassers for Jackson County convened to canvass the returns for that county, four of the six inspectors who conducted the election addressed to the board the following communication:

We, the undersigned inspectors of election of the first precinct, second ward, of the city of Jackson in said county, at the general election held November 7, 1916, at which election State, county, and district officers were voted for, including candidates for Congress, hereby certify that in preparing the statement in duplicate showing the whole number of votes cast for candidates for Representative in Congress, and the number of votes received by each of such candidates, which statement was certified by the inspectors of election for delivery to the proper officers, as provided by statute, a mistake was made in that all the votes cast for the candidates for Representative in Congress were not included therein, and, through inadvertence and mistake, votes cast for each of such candidates were omitted from said statement; and that statement of the result of the election in said precinct, so far as it relates to the office of Representative in Congress, does not correctly represent the votes cast by the electors in that it does not show the whole number of votes cast for each of the candidates for said office—the votes not so counted aggregating 70 or more votes.

CHAS. F. BARCKUS.
GEO. E. VAN CAMP.
GIFFORD BILLMAN.
HENRY MARRIOTT.

NOVEMBER 20, 1916.

The inspectors were summoned before the board and all admitted that error had been made. But the board deeming itself unauthorized to order a recount certified to the State board the original returns with a separate statement calling attention to this situation.

The contestant contended that as the returns were conceded to be erroneous they should be set aside and a recount of the ballots had. The contestee insisted that, as the ballot boxes had not been sealed and kept in safe custody as provided by law, a recount would be unlawful and the official returns must stand.

In support of his contention he cited the Michigan statute on the subject:

After the ballots are counted they shall, together with one tally sheet, be placed in the ballot box, which shall be securely sealed in such a manner that it can not be opened without breaking such seal. The ballot box shall then be placed in charge of the township or city clerk, but the keys of said ballot box shall be held by the chairman of the board and the election seal in the hands of one or the other inspectors of election. (See. 37, Elec. Laws Mich., revision 1913.)

As to whether this provision of the Michigan law should be construed as mandatory or as merely directory the committee decided:

The general rule applicable to the construction of such statutes is well stated by McCrary:

"If the statute expressly declares any particular act to be essential to the validity of the election, or that its omission shall render the election void, all courts whose duty it is to enforce such statute must so hold, whether the particular act in question goes to the merits or affects the result of the election or not. * * * But if, as in most cases, the statute simply provides that certain acts or things shall be done within a particular time or in a particular manner and does not declare that their performance is essential to the validity of the election, then they will be regarded as mandatory if they do and directory if they do not affect the actual results of the election. (McCrary on Elections, 225. See also to same effect Barnes *v.* Supervisors, 51 Miss., 305; Wheelock's Case, 82 Pa. St., 297; Allen *v.* Glynn, 17 Col., 338; Parven *v.* Wineberg, 130 Ind., 561; Bowers *v.* Smith, 111 Mo., 145; State *v.* Van Camp, 36 Nebr., 91.)

"Those provisions of a statute which affect the time and place of the election and the legal qualifications of the electors are generally of the substance of the election, while those touching the recording and return of the legal votes received and the mode and manner of conducting the mere details of the election are directory. (Idem 172, and Ill., Pa., Kan., and Mich. cams there cited.)"

And where the question concerned the sealing of the ballots themselves the same author said:

"In accordance with the rule that the errors of a returning officer shall not prejudice the rights of innocent parties, it has been held that, where it was the duty of a presiding officer to return the vote sealed up, a return of them unsealed, in the absence of proof or suspicion of fraud, was good. (Idem 236.)"

But statutory provisions regulating the conduct of elections and the preservation of the returns are, after all, only a means to an end, and that end is to secure a true expression of the will of the electors—a free ballot and a fair count. To this end all merely formal legal requirements must bend, and, if the returns are so made and preserved as to furnish satisfactory evidence of the will of the voters, that will must prevail.

The real question to be answered in this case is not whether the precise form of the statute was observed, but whether the ballots recounted were the identical ballots cast at the election, and if their condition had remained unchanged. If so, their value as evidence is unimpaired, and in the absence of statutory restraint, there can be no legal objection to their being recounted.

That this is the true principle from the standpoint of authority we quote:

"It is well settled that statutes prescribing the mode of preservation of the ballots are directory merely, and if it be clearly and satisfactorily proved that they have been kept intact and inviolate in the same condition as when counted, the ballots are admissible in evidence, although not preserved in the manner prescribed by the statute. (15 Cyclop. Law & Proc., 426.)

"In determining this and similar questions in cases of contested election it should be kept constantly in mind that the ultimate purpose of the proceeding is to ascertain and give expression to the will of the majority as expressed through the ballot box and according to law. Rules should be adopted and construed to this end, and to this end only. (McCrary on Elections, 232; People *v.* Bates, 11 Mich., 362.)

"The better opinion seems to be that, if the deviation from the statutory requirements relative to the manner of preserving the ballots has been such as necessarily to expose them to the public or unauthorized persons, the Court should exclude them; but if the deviations have been slight, or of such a character as to render doubtful the identity of the ballots, the question of their identity will go to the jury to be determined upon all the evidence. (Idem, see. 473, and People *v.* Livingston, 80 N. Y., 66.)"

As to the proper sealing of the ballot boxes the committee say:

We can find no satisfactory evidence in the record to show that the boxes ever contained any other seals than those which appeared when they were produced before the county board, and therefore can find no warrant for the inference of fraud based upon the assumption that the boxes had before borne a different seal. The theory that the boxes were tampered with after delivery to the clerk seems to us not only most improbable but inconsistent with all the known facts of the case.

Our conclusion, therefore, is that there is no proof or reasonable suspicion of fraud connected with these returns, that they have at all times remained in safe and legal custody, and that their value as evidence was nowise impaired by the failure of the inspectors to seal the boxes in the precise manner required by the statute.

In the second precinct of the sixth ward in the city of Jackson confusion arose over the unintentional mixing of the ballot boxes:

To sum up the whole matter: The official return is conceded by everybody to be wrong; it ought not therefore to be made the basis of title to anybody's seat in Congress. If it can not be corrected, it ought to be rejected entirely. But we think the means are at hand whereby this error may be legally corrected. In the presence of a sworn officer of the law, counsel for both parties recounted these ballots and reached a result which is not in dispute. We think that recount should stand in place of the original return as the true vote.

The ballot boxes for the city were all labeled with the numbers of their respective precincts and wards, but by mistake on election morning one box labeled "third precinct" was delivered at the second precinct, and one box labeled "second precinct" was delivered at the third precinct. At the close of the election the canvassed returns at the second precinct were placed in three boxes—two belonging to the precinct and properly labeled, and one, the box labeled "third precinct" already described; while at the third precinct all the ballots were put in the box labeled "second precinct" aforesaid, and delivered to the clerk's office.

The situation was still further complicated by the fact that when the work of the election ended at the second precinct the inspectors failed to return to the clerk's office along with the rest of the returns one of the ballot boxes containing a considerable number of the ballots, and left it in the polling booth uncovered and unlocked (though the polling booth was locked), where it remained until it was discovered by the clerk four months afterward, when he went to prepare for another election. He, of course, covered and locked the box, and carried it to the clerk's office for safe keeping.

Both sides agreed that a lawful recount of this portion of the ballots could not be had, as identification was impossible, and in this the committee concurred:

Though the ballots bore every internal evidence of not having been disturbed, yet would it be a hazardous experiment and dangerous precedent to permit a recount of returns unsecured and without lawful custody for four months.

Contestant holds the official returns should stand; contestee contends that the failure of the officers to preserve a portion of the ballots, as required by law, so discredits their conduct and official character as to invalidate their whole return, and that it should be set aside in toto; and, that being done, that a recount should be had of the ballots which were properly preserved and they be accepted for the vote of the whole precinct.

But on the contention that because of this irregularity the whole return should be invalidated:

The only known fact upon which it is asked to impeach this return is that one of the four ballot boxes in use on election day (for there was a larger box for the reception of ballots during the day in addition to the three in which the returns were placed) was left open in the polling booth by the inspectors after the election, and not delivered to the clerk as required by law. From this single act of omission we are asked to infer a willful violation of the law on the part of the inspectors, and contestee's brief charges it was perpetrated with intent to commit a fraud. Is this so? We are constrained to feel otherwise, and that such harsh conclusion is inconsistent with the other known facts and all the probabilities of the case.

1. There is nothing else in the record reflecting upon the character of any of the officers who held the election. One of them at least had long been a resident of the community. No citizen complained of their conduct during or after the election. There is nothing to show that any one of them had any personal or political interest in the election of the contestant. It is not known that any of them even voted for him. Indeed it was asserted by counsel in oral argument before the committee (committee hearing) that nearly all the inspectors in the city were Republicans in politics and the statement was not denied. If this be true, even barring the question of personal character, it is inconceivable they would perpetrate a fraud to elect the Democratic. candidate.

2. It is difficult to imagine how it was possible to consummate a fraud by the method chosen in this case. The poll book showing the identity and number of electors and the form of certificate showing the votes for the candidates having been returned to the clerk along with the other ballot boxes, it is not seen how the result could have been affected by anything done to the ballots in the box that was left. The only theory, consistent with crime under the circumstances, would seem to be that the officers had all conspired in advance to frame up a false return, and had retained this box with enough ballots to be altered so as to sustain the return. How this could have been accomplished where the vote was canvassed in public as required by the Michigan law, is not attempted to be explained. But if such a scheme had been executed, surely such wary criminals would have contrived in some way to "deliver the goods," and not have left the highly finished work of their hands exposed to the uncertainties of fortune in a remote corner of the city. With an official ballot in use and no extra ballots obtainable, It is not probable that outsiders could have been expected to aid materially in "doctoring the returns."

3. The facts that the total number of ballots collected from this and three other boxes (one of which was from another precinct) corresponded with the number called for by the poll books; that they were all properly initialed by the inspectors; that the unused ballots returned bore the right serial numbers; and that the vote of the candidates for Congress shown by the ballots was substantially the same as that polled for the other candidates of their respective parties are all strong internal marks to show that no fraud had been practiced upon those returns.

4. The record shows that it was 3 o'clock in the afternoon of the second day before the inspectors finished their work; they had been continuously on duty thirty-odd hours; under such conditions is it not reasonable to suppose that the box was inadvertently left behind and without thought of wrong?

On the subject of the invalidation of official returns in general the committee lays down this rule:

In the precedents of the House we have found no case in which the official returns have been set aside except for one or more of the following causes:

1. Want of authority in the election board.
2. Fraud in conducting the election.
3. Such irregularities or misconduct as render the result uncertain.

In the Missouri contested-election case of Lindsay *v.* Scott, Thirty-eighth Congress, a case arose resting, we apprehend, upon the same legal grounds as obtain here. An official return was sought to be set aside because of the subsequent destruction of the ballots; but the ballots having been regularly numbered and counted, and the vote entered on the poll book, in the absence of

any other proof of fraud, the Election Committee reported unanimously in favor of the return, and the House sustained the report without a division.

In the long line of cases, embracing nearly every variety, adjudicated by the House, we can find no precedent for the contestee's proposal that the official return in this case be set aside, and the portion of the ballots preserved be counted for the vote of the whole precinct. Regarding certificates of election, based on partial returns of an election district—a somewhat analogous question—the House in the case of Niblock *v.* Walls (42d Cong.), rejected a county return because the county canvassers did not include all the precincts in the county.

"If a part of the vote is omitted and the certificate does no more than show the canvass of part of the vote cast * * * it is not even prima facie evidence, because non constat that a canvass of the whole vote would produce the same result. (McCrary, see. 272.)

At the precinct in question 577 duly qualified voters participated in the election; 289 of these were so fortunate as to have their ballots properly preserved; 288—the other half—without any fault on their part were so unfortunate as to have their ballots left or to become mixed with others that were left at the polls and not preserved according to law. Under these conditions we know of no principle of law or of morals that would justify us in disfranchising one-half the electors of that precinct and substituting the will of the other half for that of the whole. The very statement of the proposition carries its own refutation.

We find no sufficient cause why the official return from the second precinct, sixth ward of the city of Jackson, should be rejected and are of opinion it should be accepted as a true record of the vote cast for Congress at that poll.

The committee accordingly tabulates the official returns remaining unimpeached and adds the returns from the recount in those precincts in which the original count was rejected. This revision gave Beakes a total of 27,179 votes and Bacon a total of 27,047 votes in the district, a majority of 132 votes in favor of the contestant.

In the debate in the House it was pointed out by Mr. Watson that if the two disputed precincts were ignored the returns from the recount accepted by both sides for the remainder of the district gave the contestant a majority of 46 votes. Then, whether the official returns for the two districts in question were accepted as originally reported or whether rejected in toto, the effect was the same. The contestant was elected in either case.

On this showing the committee unanimously recommended the adoption of the following resolutions:

1. That Mark R. Bacon was not elected a Representative to this Congress in the second district of the State of Michigan, and is not entitled to retain a seat herein.

2. That Samuel W. Beakes was duly elected a Representative in this Congress for the second district, State of Michigan, and is entitled to a seat herein.

The debate in the House, when the case was called up for consideration on December 13,[1] was largely a discussion of the facts as reported, with little difference of opinion as to the conclusions reached by the committee, and the resolutions were unanimously agreed to without division.

Mr. Beakes then appeared and took the oath.

145. Ruling by the Vice President on tenure of office of Senators holding temporarary appointment in the Senate.

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[1] Second session Sixty-fifth Congress; Journal, p. 43; Record, p. 246.

On October 15, 1918, the Vice President,[1] in response to a written inquiry from the Financial Secretary of the Senate as to payment of salaries of Senators and clerks to Senators holding temporary appointment in the Senate, replied:[2]

In response to your inquiry as to the tenure of office of temporary appointment of Senators by the governors of the several States, I have the honor to give you the following opinion:

The supreme law of the land upon this question is the seventeenth amendment to the Constitution of the United States. Neither Congress nor the general assembly of any State of this Union can add to or take therefrom. The portion of the seventeenth amendment which has to do with this question reads as follows

"When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided,* That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct."

To my mind this clause authorizes the legislature of any State to empower the executive to make a temporary appointment until an election; that the legislature could either provide for a special election to take place within a reasonable time, or a fair construction of the constitutional provision would permit the legislature to delay the election until the next general election in the State.

It may be contended with some plausibility that the election might be postponed until the expiration of the term of the Senator whose death occasioned the temporary appointment. Personally, I do not so believe, nor is it needful under present circumstances to express an opinion upon this subject.

The tenure of office of those holding temporary appointments in the United States runs until the people have filled the vacancies by election, as the legislatures may direct. In all cases now under consideration the people will vote for United States Senators to fill the vacancies now being filled by these temporary appointments upon the 5th day of November next. The sole question for determination is, therefore, What constitutes an election?

The phraseology of the Constitution of the United States is radically different from that of many of the Commonwealths. Numerous State constitutions provide a tenure of office and then add that the incumbent shall hold the office for that period of time and until his successor is elected and qualified. In the seventeenth amendment to the Constitution of the United States nothing is said about holding beyond the election.

In the absence of disqualification to hold office, Senators will be elected on the 5th day of November next. They may be compelled to run the gamut of executive, administrative, judicial, and senatorial investigation before they are entitled to qualify and take their seats as Members of the United States Senate. They may fail to even reach the coveted positions. Equitably, it would seem that the present incumbents ought to be permitted to hold until the successors elected on the 5th of November have been sworn in as Senators of the United States. Such, however, is not the law. The tenure of office of all Senators now holding temporary appointment in the Senate of the United States will expire upon the 5th day of November next, and in the discharge of my sworn duty I can certify no compensation after that date.

I regret being compelled to render this opinion, but I think my duty is plain as a pikestaff.

Very respectfully,

THOS. R. MARSHALL.

146. The Iowa election case of Steele v. Scott in the Sixth-fifth Congress.

Proof that the law has been innocently disregarded in the counting of ballots opens the door to a recount as effectually as if deliberate fraud had been shown.

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[1] Thomas R. Marshall, of Indiana, Vice President.

[2] Third session Sixty-seventh Congress, Record, p. 12.

Though the marking of ballots by voters may not be in accordance with statutory requirements, if the intention of the voter is clear the vote will be counted.

Discussion of constructions placed upon the Australian ballot laws.

On May 22, 1918.[1] Mr. Riley J. Wilson, of Louisiana, from the Committee on Elections No. 1, submitted the report of the committee in the case of T. J. Steele *v.* George C. Scott, from the eleventh district of Iowa.

The sitting Member had been returned by a majority of 131 votes, which the contestant attacked, alleging failure to count votes cast for the contestant and illegal counting of votes for the contestee.

Two principal questions were presented for the consideration of the committee: First, as to the counting or rejection of ballots which had not been marked by the voter in accordance with statutory requirements; and second, as to the validity of returns certified by election officials who had disregarded the law in the manner of counting the ballots.

No question was raised by either contestant or contestee as to the correctness of the returns from 8 of the 15 counties composing the district. In the remaining five counties both had caused a recount to be made, arriving at slightly different results.

The committee, therefore, accepted the official returns from the eight counties and proceeded to take a recount of the ballots in the five counties in dispute, with the following result:

Scott	26,033
Steele	26,029
Plurality for Scott	4

In the course of this recount the committee found:

With very few exceptions the differences as shown by the recount of the contestant and contestee resulted from either including or excluding from the count, by one or the other, ballots which had been marked by placing a cross by the names of the presidential and vice presidential candidates, no squares being placed opposite their names on the ticket, but opposite the names of the presidential electors. In some instances the voter would place an X by the name of the candidate for President and Vice President on the Democratic or Republican ticket as the case might be, and then proceed on down the column and place an X by the name of each presidential elector, and then an X opposite the name of the congressional candidate for whom he desired to vote. In other instances the voter would place an X by the name of the candidate for President and Vice President, then skip the presidential electors and mark the square opposite his choice for Congressman. While this manner of marking the ballots was not strictly in accordance with the provisions of the law, yet, in the judgment of your committee, the intentions of the voters were entirely clear and these votes were counted.

It appeared that the rejection of ballots in the original count had been based upon the theory that the manner in which voters had marked them violated the Australian ballot law by rendering them susceptible of identification.

On this point the report cites the opinion of the Supreme Court of the State of Iowa in the case of Fullarton *v.* McCaffrey (158 N. W. Rep, 506):

[1] Second session of Sixty-fifth Congress, House Report No. 595, Record, p. 6911.

The distinguishing mark prohibited by law is one which will enable a person to single out and separate the ballots from others cast at the election. It is something done to the ballot by the elector designedly and for the purpose of indicating who cast it, thereby evading the law insuring the secrecy of the ballot. In order to reject it the court should be able to say, from the appearance of the ballot itself, that the voter likely changed it from its condition when handed him by the judges of election, otherwise than authorized, for the purpose of enabling another to distinguish it from others.

Distinguishing between the strict construction formerly placed upon the Australian ballot law and the modern view now generally accepted, the report further quotes from the same opinion:

In distinguishing between the former strict construction placed upon the Australian ballot law and the modern view now taken by nearly all the courts, the Iowa court, in its opinion, further says:

"Some of the earlier decisions rendered shortly after the enactment of the Australian ballot law in the several States are somewhat extreme in applying that portion relating to identifying marks, going, as we think, to the verge of infringing on the free exercise of the voting franchise, but these may be explained, if not justified, by the supposed prevalence of corrupt practices at elections prior to such enactment and the laudable purpose of efficiently applying the remedy.

"Subsequent experience has disclosed how the ordinary voter proceeds under regulations in preparing his ballot, and many of the marks at first denounced as evidencing a corrupt purpose are now thought to be due to carelessness, accident, or inadvertence. What is an identifying mark is not defined in our statute, and whether any mark on a ballot other than the cross authorized to be placed thereon was intended as a means of identifying such ballot must be determined from the consideration of its adaptability for that purpose, its relation to other marks thereon, whether it may have resulted from accident, inadvertence, or carelessness or evidence designed and the similarity of the ballot with others and the like.

"Electors are not presumed to have acted corruptly, and identifications only which may fairly be said to be reasonably suited for such purpose, and likely to have been so intended, will justify the rejection of the ballot."

Applying the law as thus construed, the committee admitted and counted all ballots on which the voter had clearly indicated a choice for Representative in Congress.

The second question raised by the contestant involved the observance by judges and clerks of election of section 1138 of the Iowa Code. The section provides:

When the poll is closed the judges shall forthwith and without adjournment canvass the vote and ascertain the result of it, comparing the poll lists and correcting errors therein. Each clerk shall keep a tally list of the count. The canvass shall be public and each candidate shall receive credit for the number of votes counted for him.

The testimony disclosed that after the polls were closed the judges in order to expedite the count separated the ballots into piles which were counted simultaneously, each judge counting separately. At the close of this count the results were compiled and certified by all as the official return.

On the propriety of this procedure the committee rule:

It is evident that all the judges did not see any one ballot, and that no one judge saw all the ballots and that no one clerk recorded or tallied them all. At the close of the count the results were combined. This method is not only irregular but contrary to law.

Although no fraud may be intended by thus disregarding the provisions of the statute, yet in the judgment of your committee proof showing that the law has been so entirely disregarded and in effect violated in the manner of counting and calling ballots, just as effectually opens the door to a recount as though deliberate fraud had been actually proven.

Various other questions growing out of the contest were presented which the committee stated but did not consider necessary to pass upon, as the recount by the committee indicated a majority of 4 votes in favor of the sitting Member. The following resolutions were accordingly recommended:

First. That T. J. Steele was not elected a Representative in this Congress from the eleventh district of the State of Iowa and is not entitled to a seat herein.

Second. That George C. Scott was duly elected a Representative in this Congress from the eleventh district of the State of Iowa and is entitled to retain a seat herein.

The report was considered in the House on June 4.[1] After brief debate, confined to an explanation of the facts in the case, the resolutions recommended by the committee were agreed to without division.

147. The Alaska election case of Wickersham v. Sulzer in the Sixty-fifth Congress.

Statutory enactments prescribing the form of ballot to be used held to be directory and not mandatory.

Instance wherein the House reversed the ruling of a United States Federal District Court.

The vote of innocent electors will not be invalidated because of error or misconduct of election officers in the performance of statutory duties.

Differentiation between mandatory election laws and election laws merely directory.

Unsworn statements and ex-parte affidavits are not admissible as evidence and will not be considered by the Committee on Elections in the adjudication of an election case.

On December 4, 1918,[2] Mr. Riley J. Wilson, of Louisiana, from the Committee on Elections No. 1, submitted the report in the case of James Wickersham *v.* Charles A. Sulzer, Territory of Alaska.

The case involved three essential points:

(1) Certain proceedings had before the judge of the United States District Court of Alaska, first division:

The act of Congress of March 7, 1906, making provision for the election of Delegate to the House of Representatives from the Territory of Alaska, provided that voting at such elections should be by printed or written ballot. Subsequently the Territorial Legislature of Alaska passed an act adopting the Australian ballot system, including the following exception as to the use of the official ballots, known as section 21:

That in any precinct where the election has been legally called and no official ballots have been received the voters are permitted to write or print their ballots, but the judges of election shall in this event certify to the facts which prevented the use of the official ballots, which certificate must accompany and be made a part of the election returns.

The Territorial board whose duty it was to canvass and certify the result of the election canvassed the votes cast at this election with the following result:

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[1] Journal, p. 425; Record, p. 7354.

[2] Third session Sixty-fifth Congress; House Report No. 839; Record, p. 97.

Charles A. Sulzer	6,459
James Wickersham	6,490
Lena Morrow Lewis	1,346
Plurality for Wickersham	31

Before a certificate was issued in accordance with the vote so canvassed, the contestee presented a petition to the United States District Court of Alaska, praying for a writ of mandamus directing the Territorial canvassing board to reject the vote returned from seven precincts as follows:

Choggiung:	
For James Wickersham	25
For Charles A. Sulzer	3
Deering:	
For James Wickersham	10
For Charles A. Sulzer	6
Nizina:	
For James Wickersham	7
For Charles A. Sulzer	3
Nushagak:	
For James Wickersham	10
For Charles A. Sulzer	3
Utica:	
For James Wickersbam	13
For Charles A. Sulzer	4
Bonafield:	
For James Wickersham	3
For Charles A. Sulzer	1
Vault:	
For James Wickersham	8
For Charles A. Sulzer	2

In the petition it was charged that the vote at each and all of the above named precincts except Vault and Nizins should be rejected and not counted for the reason that the form of official ballot prescribed by the Territorial legislature had not been used and that no certificate explaining the facts which prevented the use of the official ballots had accompanied the election returns as a part thereof and as required by the laws of Alaska. In other words, that the election officials had not complied with the provisions of section 21 of the act of 1915 in that no official ballots were used at either of the said precincts and no certificates explaining the facts which prevented the use of the official ballots accompanied the returns. As to Vault precinct, it was charged that no certificate of the result of the election in this precinct specifying the number of votes cast for each candidate accompanied or was included in the returns. At Nizina it was claimed that the judges of election were not sworn.

An alternative writ of mandamus was issued March 2, 1917, as requested, and was made peremptory March 23, directing the rejection of the vote cast at each of the precincts listed with the exception of Nazina.

The effect of this judgment was to revise the returns as follows:

Sulzer	6,440
Wickersham	6,421
Plurality for Sulzer	19

In accordance with this decree, the canvassing board issued the certificate of election to contestee:

As to the action of the court in issuing the writ of mandamus the committee say:

The thing important in this phase of the case is the proper construction of the Alaska election law, and particularly section 21.

Judge Jennings held the law mandatory, and specifically the proviso in section 21, and that the failure of the judges of election to place with and make as a part of the returns a certificate showing the facts which prevented the use of official ballots vitiated the returns from five of the six precincts named, and ordered the vote thereat rejected and not counted for Delegate to Congress;

Your committee has found itself unable to agree with that construction of the law, and herewith submits the facts and legal considerations which have impelled that conclusion. We readily admit as a general proposition that under the Australian ballot law the provisions requiring the use of an official ballot must be followed, and that no other form of ballot can be used without some special provision of the law authorizing its use.

The statute under consideration authorized the electors in event they were not supplied with official ballots to write or print their ballots, that is, to use a ballot that was not official, and imposed upon the judges of election the duty of certifying to the facts which prevented the use of official ballots.

The conditions in Alaska were such that the Territorial legislature wrote into the law this exception for the use of nonofficial ballots. The question now is to determine whether or not this section of the Alaskan election law is mandatory or is it merely directory.

The report discusses the question of mandatory and directory statutes as follows:

The question of mandatory and directory statutes as applied to elections has been discussed before the House of Representatives more often than any other legal question pertaining to contested-election cases. The precedents indicate that the rulings here have been quite as uniform as in the courts. Each case has some peculiar distinctive features of its own, and after the facts have developed the task becomes one of correct application of the law as established by the many precedents here as well as the decisions of the courts.

The following authorities are submitted as establishing a correct interpretation of the law applicable to the issues in this case.

"Those provisions of a statute which affect the time and place of the election, and the legal qualifications of the electors, are generally of the substance of the election, while those touching the recording and return of the legal votes received and the mode and manner of conducting the mere detaBs of the election are directory. The principle is that irregularities which do not tend to affect the results are not to defeat the will of the majority; the will of the majority is to be respected even when irregularly expressed. The officers of election may be liable to punishment for a violation of the directory provisions of a statute, yet the people are not to suffer on account of the default of their agents. (McCrary on Elections, p. 172, sec. 228.)"

It has been repeatedly held that where the law itself forbids the counting of ballots of certain kinds or forms that do not meet the provisions of the statute, it is mandatory, and that it should be so construed by the courts.

Where the statute itself provides what the penalty shall be on the failure to comply with its terms, if the law is constitutional, there is no room left for construction. There is no provision of this character in the Alaska election law or pertaining in any way to section 21.

The Supreme Court of Missouri in the case of Horsefall *v.* School District, One hundred and forty-third Missouri Reports, page 542, in passing on a case where the irregularities charged were failure to number the ballots and that the form of the ballots was not as prescribed by the statute, said:

"The decisions of the supreme court of this State have not been altogether harmonious as to the effect of irregularities upon the result of an election, and we shall not attempt to review these cases, but we think that it may now be said to be the established rule of this State, as it is generally

in other jurisdictions, that when a statute expressly declares any particular act to be essential to the validity of an election, then the act must be performed in the manner provided or the election will be void. Also if the statute provides specifically that a ballot not in prescribed form shall not be counted, then the provision is mandatory and the courts will enforce it; but if the statute merely provides that certain things shall be done and does not prescribe what results shall follow if these things are not done, then the provision is directory merely, and the final test as to the legality of either the election or the ballot is whether or not the voters have been given an opportunity to express, and have fairly expressed, their will. If they have the election will be upheld or the ballot counted, as the case may be."

This decision has been widely quoted and approved and is in our judgment a correct statement of the law and peculiarly applicable to the issues in this case.

Another very interesting decision is found in the Sixty-eighth Texas Reports, page 30, Fowler *v.* The State, in which the complaints were largely against the manner in which the election returns were made, being

"First. That no tally sheets or poll lists were kept and returned as required by law.

"Second. That the ballot box was sent to the county judge through the United States mail instead of by the presiding officer or manager of election.

"Third. Because the county judge did not receive the returns sent him.

"Fourth. Because the returns were not made in triplicate as required by statute."

In this case the court, after reviewing the grounds upon which the election was asked to be set aside, said:

"Without separately considering each of the objections raised to the manner of holding the election at precinct No. 3 and of returning its results, all such objections, including those we have already passed upon, may be disposed of on the ground that the requirements of the election law not obeyed by the managers were not mandatory but directory. The statute does not say that a failure to pursue the course pointed out by it in these respects shall vitiate the election, nor is there anything in the nature of these provisions which requires us to give them that effect. The object of every popular election for officers is to ascertain the will of the people as to what persons shall serve them as such in the various positions to be filled. A free, fair, and full expression of the public will is sought, and certain means are prescribed by law as the most certain to bring about the desired result. Some of these, from their very nature, or from the manner in which they are prescribed, are deemed absolutely essential to the accomplishment of the desired result. Among these may be named the requirement that the voting shall be by ballot; that it shall take place on a certain day and within certain precincts, etc. These are prescribed to insure perfect freedom of choice to the citizen, to serve his convenience in getting to the polls, and to bring out a full vote at the election.

"Then there are other requirements, such as those which have been neglected in this case, that are merely formal in their character. The law deems that it is proper that they should be pursued in order to prevent frauds in the election and tampering with the votes and returns. If strictly followed, they furnish the best evidence that the election has been fairly conducted, and the burden of proof to show that it was not, either wholly or in part, rests upon the party attacking the returns. But these requirements are always treated as directory unless the law, either expressly or in effect, makes them essential to the validity of the election. Electors must not be deprived of their votes on account of any technical objection to the manner in which the election has been held, or for any misconduct on the part of its presiding officers, if these have not affected the true result of the election. (Cooley's Constitutional Limitations, 617, 618; Prince *v.* Skillin, 71 Maine 361.) This would be to deprive the citizen of a great constitutional privilege for a mere informality; to place within the power of a few persons to defeat the right of suffrage altogether. The very means provided to insure a fair and proper election might become an instrument of fraud and dishonesty."

The New York Court of Appeals, in the case of People ex rel. Hirsh *v.* Wood, New York Reports, 143, stated the law in relation to this question as follows:

"We can conceive of no principle which permits the disfranchisement of innocent voters for the mistake or even willful misconduct of election officers in performing the duty cast upon them.

The object of elections is to ascertain the popular will and not to thwart it. The object of election law is to secure the rights of duly qualified electors and not to defeat them. Statutory regulations are enacted to secure freedom of choice and to prevent fraud, and not by technical obstructions to make the right of voting insecure and difficult."

We have been cited to numerous authorities, holding that the mandatory or directory character of a statute does not always depend upon its form or the terms used, but rather grows out of the nature of the subject with which it deals, and the legislative intent and purpose in framing and adopting the law. With these authorities we agree, but they can only be applied here in so far as they are applicable to the case under consideration.

The application of the law as stated is then made to the case at issue:

As we understand and appreciate the facts and issues in this case the legislative intent is very clear and the purposes and scope of the law easily determined.

The law of Alaska providing for official ballots, in the respect that it contains an exception authorizing the voter to use under certain conditions a ballot of his own make, is in a claw by itself.

There are a few statutes directing that in event the regular official ballot is not supplied, certain designated officers may prepare and furnish a ballot in the form prescribed by law. This, then, becomes an official ballot.

Section 21 of the Alaska law says, in the event that the official ballots are not received, "the voters are permitted to write or print their ballots." These are the methods to which they had been accustomed under the congressional act. The ballot prepared by the elector provided for in section 21 is not official, but it is legal. He is doing just what the law says he may do.

The statute imposes certain duties upon the judges of election at each precinct; that is, they receive the official ballots from the United States commissioner, and deliver such ballots to the electors as they appear to vote, and in the event they have no official ballots with which to supply the voters, should they avail themselves of the privilege given to write or print their ballots, then the said officers shall certify to the facts which prevented the use of the official ballots, which certificate must accompany the returns as a part thereof.

The object of this certificate is to furnish an explanation by these officers showing why they had not supplied the electors with the official ballots and had permitted the use of those that were not official.

Now, why should the voter who had done just what the law told him he might do lose his vote because these officials neglected to make out and enclose with the returns a certificate, making the proof that they had not failed in the discharge of the duties imposed upon them. The court held section 21 to be mandatory not only in its requirement that this certificate be made (and we incline to agree with him in so far as the officials were concerned), but to the extent that no proof of its existence could be considered unless it be with and made a part of the returns and that no manner or form of evidence as to the failure to receive the official ballots could save the rejection of the vote.

It is with this latter strict construction we can not agree. Neither do we find anything in the law to authorize the assumption that the legislature intended that innocent voters might forfeit their franchise without any fault of their own or that any man might be deprived of his traditional day in court

In construing this statute and arriving at the legislative intent the general situation in Alaska becomes important in many respects. The extent of its territory, and the conditions prevailing in relation to transportation and communication between its various sections are parts of the res gestae. Alaska is in extent of territory one-fifth the size of the United States, thinly populated, and with the exception of a few towns and cities is composed of settlements scattered over its extensive area. There are few railroads and the method of communication to many points is difficult and uncertain. In all this territory at the November election of 1916 only about fifteen thousand (15,000) ballots were cast for the Delegate to the House of Representatives. It is only natural that the legislature in adopting the Australian ballot should take these facts into consideration and in order that all the people in the Territory might have the opportunity to exercise the elective franchise, it being evident in many instances that at precincts in remote sections the official

election supplies would not be delivered, enacted the provision, which is such an unusual exception to the Australian ballot law in general.

It was foreseen by the Territorial legislature that it would be necessary, if the electors in many of the outlying precincts were to have the opportunity to vote at all, they should be given the privilege of either writing or printing their ballots, and the legislature's foresight and expectstions in that respect are abundantly confirmed by the facts in this case. This provision was enacted in the interest of the electors in remote places in order to secure for them the exercise of the privilege of voting, and it is not quite possible to believe that in making it the duty of the election judges to certify to the facts which prevented the use of the official ballots it was ever intended that their failure to do so would vitiate the returns and deprive the citizen of the right to have his ballot counted as cast.

According to the record in this case, there were only eight precincts in the entire Territory where the official ballots were not received in the 1916 election. From five of these there were no certificates accompanying the returns showing why official ballots were not used. It is not contended that any fraud was committed at any of these precincts, and there is no proof in the record to that effect.

If the result of the election should be determined by the vote at these precincts, why should not a candidate be permitted to submit proof to a court or to the House of Representatives showing the facts as to the presence or want of presence of the official ballots? In the judgment of your committee, such a right existed. We are further of the opinion that the record satisfactorily establishes the fact that official ballots were not received at the precincts in question and that the proof is made by legal and competent evidence.

In announcing this conclusion, the committee incidentally refer to the character of evidence presented:

It is contended that this conclusion could not be reached without considering ex parte affidavits, private letters, telegrams, and incompetent hearsay. It is true that there is much private correspondence by letter and wire and a number of ex parte affidavits in this record which are not evidence, and which have no place here, and have not been considered by the committee in reaching its conclusion.

It is important, therefore, to state the facts established by legal proof upon which we reached the conclusion that the required official ballots were not supplied.

148. The election case of Wickersham v. Sulzer, continued.

In the absence of proof to the contrary, election officers are presumed to have fully discharged the duties devolving upon them as such.

The vote of qualified electors offering to vote, but improperly denied, were counted as if cast.

The domicile of soldiers in the service of the United States is established by nativity or by residence with the requisite intention or derivative as that of family or dependents.

Service in the United States Army does not disqualify as a voter at the legal place of residence, but residence may not be acquired by length of time quartered under Army orders in any particular place.

Native Indians who had severed tribal relationship held to be citizens and entitled to vote.

To qualify as an elector a person must be in legal acceptation, an inhabitant, initiating and continuing his residence voluntarily, on his own motion and in his own right.

Where the nature of illegal votes could not be determined the committee on election made a pro rate reduction from the poll of each candidate.

At the Vault precinct the judges had failed to sign the certificate in the back of the register and tally book. They had, however, signed the duplicate certificate transmitted to the clerk of the court and had complied with all other formalities. So, in the absence of any evidence of willful misconduct, the committee held the omission was not vital and that the vote at Vault should not have been rejected.

(2) As to the legality of votes cast by Indians in certain sections of the Territory:

It is contended by both parties that in certain precincts the votes of a number of Indians should not have been received and counted; that is, the contestant claims that in a number of precincts where Indians voted and the majorities were for the contestee, the Indian were not entitled to vote, for the reason that they had not severed their tribal relations and were not citizens in the sense that they might be qualified electors; while on the other hand, the contestee claims that at certain other precincts where the majorities were for the contestant, a portion of the vote being that of Indians, was not legal for like reasons. In these charges are also included Russians of mixed Indian blood called Creoles and Eskimos. Apparently in respect to citizenship and the right to vote all these are classified as Indians.

Under the law of Alaska every native Indian, born within the limits of the Territory, who has severed his tribal relationship and adopted the habits of civilized life becomes a citizen and is entitled to vote. The law provides methods by which he may obtain evidence showing that he has met with the requirements of the law, but this is not compulsory, leaving the matter a question of fact peculiar to the individual case.

From the indefinite, conflicting, and unsatisfactory character of the evidence in this case it is not practical or possible to say whether or not the election officers were within the law in receiving or rejecting the votes of Indians who voted or would have voted at this election. With very few exceptions, the evidence is of a general nature, and with respect to many there is no evidence at all. The evidence fails to disclose any intention or attempt to commit fraud at either of the precincts in question and where the Indians voted. The election officers have particular knowledge of the conditions and the people in the locality surrounding precincts where they preside, and it is their duty to know that each voter is duly qualified before permitting him to deposit a ballot. These officers are presumed to have discharged this duty. The evidence shows very clearly that many of the Indians were entitled to vote. The Indian vote is mingled with that of other citizens, and the record points out no intelligent way by which it may be ascertained that any injury is actually proved to have resulted to either candidate on account of the Indian vote. It is probable that a portion of this vote is illegal, but the action of election officers charged with the duty of conducting elections should not be set aside except upon definite proof, and the votes once received by such officers should not be rejected unless the proof establishes in some definite way that the voters were not qualified and the number and identity of votes that should not be counted, and especially is this true in the absence of proof of any conspiracy to commit fraud.

The attorney for the contestee, in his very able argument before your committee, after reviewing the entire question of this phase of the case, took the position that if a portion. of the Indian vote was counted it should be counted as an entirety, or if rejected it should be rejected as a whole.

For the reasons above stated, the committee has reached the conclusion that the fairest thing to do, in view of the testimony, is to count it all.

Now, as exceptions to the above, George Demmert and R. J. Peratovich, who appeared in person and offered to vote at Craig precinct, should have been permitted to do so.

The testimony shows that they were qualified electors under the laws of Alaska, and each on being examined as a witness states that he appeared in person and offered to vote and that he would have voted for Sulzer, and the committee is of the opinion that their votes should be so counted.

(3) As to the legality of the votes of soldiers of the United States Army stationed at Fort Gibbon and who voted there, and the votes of other soldiers in the Army who voted at Eagle precinct:

The evidence shows conclusively that 36 soldiers in the United States Army, stationed in Alaska, voted in this election—4 at Eagle and 32 at Fort Gibbon. Apparently there is no difference or controversy as to the facts in relation to these soldiers, except in respect to their right to vote at these precincts in Alaska. Hence, the question is purely of a legal nature. The facts may be stated as follows:

Each and all the men whose votes are in question here came to Alaska as soldiers in the United States Army. They remained in such service from the respective dates of their arrival in Alaska up to and until November 7, 1916, the date of this election, and were there in such service on that date. All were enlisted and accepted for service in the States.

Seven were honorably discharged and reenlisted in Alaska on the following day.

Each and all of them had been in the Territory more than a year immediately preceding the date of election and at Eagle or Fort Gibbon more than 30 days immediately preceding election day.

If they had acquired a legal domicile in Alaska, they were entitled to vote and the votes should be counted; otherwise not.

To become a citizen and a qualified elector in Alaska, a bona fide residence of one year in the Territory and 30 days in the voting precinct is required.

The question of domicile or place of residence of those in the military service of the country either as officers or as men in the line, has been before Congress and in the courts in a number of cases, but not of very recent date so far as Congress is concerned. The subject is one of great importance and absorbing interest just at this time, not only in this case and in Alaska, but throughout the country.

Hence a very careful examination of the authorities bearing upon this question has been made, and we submit as a correct statement of the law the following:

"(1) In the case of an officer or enlisted man in the Military Establishment, held that his domicile during his continuance in the service is the domicile or residence which he had when he received his appointment as an officer or entered into an enlistment contract with the United States. This is true whether such a domicile was original—that is, established by nativity—or by residence with the requisite intention, or derivative, as that of a wife, minor, or dependent. This residence or domicile does not change while the officer remains in the military service, as his movements as an officer am due to military orders; and his residence, so long as it results from the operation of such orders, is constrained, a form of residence that works no change in domicile.

"(I. A.) A person in the military service of the United States is entitled to vote where he has his legal residence, provided he has the qualifications prescribed by the laws of the State. He does not lose such residence by reason of being absent in the service of the United States. The laws of a particular State in which he is stationed and has only a temporary as distinguished from a legal residence may, however, permit him to vote in that State after a certain period of actual residence.

"(Digest of Opinions of the Judge Advocates General of the Army. Howland. Pages 976, 977, 978.)"

Also from McCrary on Elections, page 70, sections 90 and 91:

"Sec. 90. The fact that an elector is a soldier in the Army of the United States does not disqualify him from voting at his place of residence, but he can not acquire a residence, so as to qualify him as a voter, by being stationed at a military post whilst in the service of the United States.

"Sec. 91. Soldiers in the United States Army can not acquire a residence by being long quartered in a particular place, and though upon being discharged from the service they remain in the place where they have previously been quartered, if a year's residence in that place is required as a qualification for voting, they must remain there one year from the date of discharge before acquiring the right to vote."

Applying this law to the facts here, the 36 soldiers stationed in Alaska who voted at Eagle and Fort Gibbon were without legal domicile there, and were not in any legal sense inhabitants of the Territory and therefore were not qualified electors therein.

It is contended, however, that these soldiers had changed their residence from the States where they enlisted to Alaska and had acquired domicile there. The evidence in support of this is that they appeared on election day, and upon their votes being challenged, took the required oath containing the declaration of residence and voted. The contention is made that the residence or domicile of a soldier is determined by his intention; that (quoting from brief) "these soldiers have already shown their purpose and have established their residence in Alaska."

This argument seems to be based upon the assumption that the soldier or officer in the military service sent under orders away from the State of his original domicile and stationed in another State, while subject to the orders of his superiors, can have and exercise voluntarily and in his own right the requisite intention necessary to effect a change in domicile and that, after being so stationed for the statutory period required for voting, a declaration of choice of domicile accompanied by the act of voting constitutes sufficient evidence that the change has been effected.

Without stopping to discuss the public policy of approving here and establishing a rule of this kind, it is sufficient to say that the law and authorities are in practical harmony and are all the other way.

So under the laws of Alaska, as in all the States in so far as the committee is informed, a person to be a qualified elector must, in legal acceptation, be an inhabitant.

Manifestly no one can become an inhabitant in Alaska or in any of the States (at least without some provision of the law authorizing) who does not initiate and continue his residence there voluntarily on his own motion and in his own right.

At Eagle and Fort Gibbon precincts, where the 36 votes thus invalidated by the committee were cast, a total of 92 votes were polled. As it was not shown for whom the 36 votes were cast, the committee, in order to save the votes legally cast and avoid discarding the entire poll at the precincts affected, ruled that a pro rata, reduction should be made from the poll of each candidate.

Readjustment of the entire vote of the district in accordance with these findings of the committee on the various issues presented resulted as follows:

Wickersham	6,480
Sulzer	6,433
Plurality for Wickersham	47

On the strength of this showing the committee recommended the following resolutions:

1. That Charles A. Sulzer was not elected a Delegate to the House of Representatives from the Territory of Alaska in this Congress, and is not entitled to retain a seat herein.

2. That James Wickersham was duly elected a Delegate to the House of Representatives from the Territory of Alaska in this Congress, and is entitled to a seat herein.

The case was spiritedly debated in the House on January 3, 4, and 7, 1919.

On January 4,[1] Mr. John L. Burnett, of Alabama, moved to recommit the report to the Committee on Elections No. 1, with instructions to report thereon by or before February 10, 1919.

On January 7,[2] the question being taken on the motion to recommit it was decided in the negative—yeas 131, nays 187. The question then recurring on the

[1] Journal, p. 53; Record, p. 1059.

[2] Journal, p. 55; Record, p. 1106.

resolutions recommended by the committee, the resolutions were agreed to—yeas 229, nays 64.

Thereupon, Mr. Wickersham appeared and took the oath.

It may be noted that Mr. Wickersham belonged to the minority party of the House, while contestee belonged to the majority party.

149. The Oklahoma election case of Davenport v. Chandler in the Sixty-fifth Congress.

Instance wherein the committee on elections submitted resolutions deciding an election case without accompanying report.

On January 27, 1919,[3] Mr. John N. Tillman, of Arkansas, a member of the Committee on Elections No. 2, introduced the following resolution:

Resolved, First. That James S. Davenport was not elected to the House of Representatives from the first district of the State of Oklahoma in this Congress and is not entitled to a seat therein.

Second. That T. A. Chandler was duly elected to the House of Representatives from the first district of the State of Oklahoma in this Congress and is entitled to seat therein.

On February 5,[4] Mr. Tillman said:

Mr. Speaker, I ask to call up House resolution 523 and dispose of it. It is the report of the Committee on Elections No. 2, seating Mr. Chandler of Oklahoma, the sitting Member.

The resolution was agreed to without debate or division.

150. The New York election case of Gerling v. Dunn in the Sixty-fifth Congress.

Congress has authorized the use of voting machines in the States.

Although the notice of contest filed by contestant was defective, the House considered the merits of the case.

The House of Representatives does not pass upon matters of policy in the conduct of elections or questions relating to the validity of State laws, and such questions should be addressed to the legislative department of the State government or adjudicated in the State courts respectively.

On February 17, 1919,[5] Mr. Riley J. Wilson, of Louisiana, from the Committee on Elections No. 1, submitted the report in the New York case of Jacob Gerling *v.* Thomas B. Dunn.

The vote polled for contestant and contestee, respectively, as shown by the official returns in this case, was as follows:

Thomas B. Dunn	29,894
Jacob Gerling	13,867
Majority for Dunn	16,027

The contestant in his notice of contest duly filed alleges that the election was illegal and unconstitutional and therefore void for the reasons that:

First. The voting machines used at said election did not comply with the requirements of the election law of the State of New York and that they were not legal machines as defined by the

[3] Third session Sixty-fifth Congress, Journal, p. 123; Record, p. 2186.

[4] Journal, p. 152; Record, p. 2757.

[5] Third session Sixty-fifth Congress House Report No. 1074; Journal p. 199; Record p. 3578.

statutes of that State and were not so arranged for use in voting as required by the New York election laws.

Second. That certain provisions of the constitution of the State of New York had been violated in the manner and method of conducting the election by the use of such voting machines and also by the enactment of a special law by the Legislature of New York State designed especially for Monroe County, under which law this election was conducted.

Third. That the voting machines used at this election were prepared and arranged by an expert and not by the proper legally constituted authorities, and that such machines were not properly tested before use at this election.

Fourth. That the machines used at this election did not provide a secret method of voting as provided by the New York State constitution.

The report says:

The notice of contest is faulty and defective in the respect that the allegations are vague, indefinite, and general. However, the committee considered the merits of the case.

Practically all the grounds upon which the contest is based relate to matters of policy that should be addressed to the consideration of the legislative department of the State government, or to questions proper to be determined and adjudicated by the courts of New York State and not by Congress.

It has not been and should never be the policy of the House of Representatives to pass upon the validity of State laws under which elections are held when the complaint is that the legislative enactment is contrary to the provisions of the State constitution.

The contestant bases his case entirely upon questions relating to the use, authorization and arrangement of voting machines provided for voters at the election. The committee point out:

Congress has authorized the use of voting machines in the States.

On February 14, 1899, section 27, Revised Statutes of 1878, was amended and reenacted to read as follows:

"All votes for Representatives in Congress must be written or printed ballot or voting machine, the use of which has been duly authorized by the State law; and all votes received or recorded contrary to this section shall be of no effect."

Voting machines have been in use in New York State for many years, authorized by its constitution, provided for by its legislature, and sanctioned by its courts.

The evidence in this case fails to support by definite proof any of the charges made against the machines used at this election or to disclose any fraudulent or illegal action on the part of any official connected with the conduct of the election, or the canvass, tabulation, and return of the vote.

As the contestant did not allege his own election or the failure of the contestee to receive a majority of the votes cast, the committee in reporting to the House omitted the usual resolution declaring the contestant not elected and not entitled to a seat therein, and submitted the following only:

That Thomas B. Dunn was duly elected a Representative in this Congress from the thirty-eighth congressional district of the State of New York and is entitled to retain a seat herein.

The resolution was agreed to without debate.

151. The Missouri election case of Salts v. Major in the Sixty-sixth Congress.

The committee having found the sitting Member duly elected, deemed it unnecessary to consider claims that he was entitled to additional votes.

It is not the policy of the House of Representatives to pass upon the validity of State election laws alleged to be in conflict with the State constitution.

A law forbidding the counting of ballots which fail to conform to statutory requirements is mandatory, and such ba1lots win not be counted.

On May 11, 1920,[1] Mr. Frederick W. Dallinger, of Massachusetts, from the Committee on Elections No. 1, submitted the report of the committee in the Missouri case of James D. Salts *v.* Sam C. Major.

According to the official returns in this case the contestee received 20,300 votes and the contestant 20,222 votes, a majority of 78 votes for the sitting Member.

Numerous irregularities were alleged in the notice of contest, but in the testimony adduced and in the briefs filed the contestant relied entirely on allegations that a fraudulent alteration of the tally sheet in the second ward of the city of Sedalia credited to contestee 40 votes which should have been credited to contestant, and that an error in the tabulation of the vote in Boone Township in Green County had deprived contestant of 37 votes which should have been counted for him.

The sitting Member in his answer denied these allegations and claimed that the entire vote of the fourth ward of the city of Springfield, in Green County, should be rejected on account of the failure of election officials to indorse thereon the registration numbers of the voters as required by the election laws of the State of Missouri.

Considering the ballots themselves to be the best evidence, the committee directed the Sergeant at Arms to send for ballots and records of the two precincts in question. The ballots at Sedalia had been destroyed at the expiration of one year from the date of the election as provided by the election law of the State of Missouri. But the ballots cast in Boone Township were still available and were forwarded to Washington and counted by the committee.

The count of these ballots by the committee increased the vote cast for James D. Salts by 32 votes over that certified in the official return from the precinct.

As to the charge of fraud in altering the tally sheets in the second ward of the city of Sedalia, the committee say:

> In regard to the vote in the second ward of the city of Sedalia, in Pettis County, where the contestant claim that through a fraudulent alteration of the tally sheet 40 votes were taken from him and added to the vote of his opponent, in the absence of the ballots themselves, the committee was obliged to rely upon the testimony as contained in the record of the case. While it is true that the tally sheet and the official record were altered, the overwhelming weight of the testimony shows that there was no fraud involved, but that the alterations were honestly made to correct a mistake of an incompetent election clerk. The evidence discloses the fact that the two election clerks in this ward on election day were Charles P. Keck, Republican, and Mark A. Magruder, Democrat. It also appears from the evidence that Mr. Keck, the Republican clerk, was a bank cashier, while Mr. Magruder, the Democratic clerk, was inexperienced in clerical work and had continual trouble with his tally sheet during the day; and that when the vote was tabulated on election night it was found that Mr. Magruder's total did not agree with that of Mr. Keck as to several of the offices, including that of Congressman. Mr. Kell, the Republican judge of elections, thereupon instructed Mr. Magruder to make his totals agree with those of Mr. Keck. In accordance with these instructions Mr. Magruder made the changes in the tally sheet which are complained of by the contestant.

[1] Second session Sixty-fifth Congress, House Report No. 961; Record, p. 6892.

Your committee therefore finds that the official returns of the second ward in Sedalia, as certified to by the election officers and the secretary of state, are the correct returns, and that James D. Salts, the Republican candidate, is not entitled to any additional votes from said ward.

As to the fourth ward of the city of Springfield:

The committee having found that as a matter of fact Sam C. Major, the Democratic candidate, was duly elected, it is unnecessary to consider the claim raised by counsel for the contestee that the entire vote of the fourth ward of the city of Springfield which was included in the official returns, should be thrown out. Your committee, however, is of the opinion that attention ought to be called to the fact that the precedents of the House of Representatives clearly support the contention of the contestee in this matter.

It is admitted that section 5905 of the Revised Statutes of the State of Missouri (1909) provides that in cities where registration of voters is required—and it is also admitted that Springfield is one of such cities—the clerks of election shall place on each ballot "the number corresponding with the number opposite the name of the person voting, found on the registration list, and no ballot not so numbered shall be counted."

It is further admitted that this provision has been in the statutes of the State of Missouri for many years and that it has never been declared to be in conflict with the constitution of that State by any tribunal either Federal or State.

The contestant in rebuttal submitted that this statute was in contravention of the constitution of the State of Missouri, but the committee reaffirmed the decision in the case of Gerling *v.* Dunn in the Sixty-fifth Congress, holding that it was not the policy of the House of Representatives to pass upon the validity of State laws under which elections are held when the complaint is made that the legislative enactment is contrary to the provisions of the State constitution.

The contestant further submitted that the statute, even if constitutional, was directory merely and not mandatory, and failure to comply with its requirements did not vitiate the vote. The committee held this contention to be at variance with the well-established precedents of the House of Representatives, and cited the statement from the decision in the case of Wickersham *v.* Sulzer to the effect that where the law itself forbids the counting of ballots which do not meet its requirements, the statute is mandatory.

In further support of this doctrine the committee cite the cases of Miller *v.* Elliott in the Fifty-second Congress, and Threasher *v.* Enloe in the Fifty-third Congress, and quote the following excerpt from the opinion by the Supreme Court of the State of Missouri in the case of Horsefall *v.* School District:

If the statute provides specifically that a ballot not in prescribed form shall not be counted, then the provision is mandatory and the courts will enforce it; but if the statute simply provides that certain things shall be done and does not prescribe what results shall follow if these things are not done, then the provision is directory merely.

They then make the following application to the present case:

In the present case the Missouri statute provides specifically that "no ballot not so numbered shall be counted," and is clearly mandatory and not directory. Accordingly, if the other facts in the case did not clearly show that Sam C. Major, the Democratic candidate, was duly elected, the committee would be obliged, if it followed its own precedents, to hold as a matter of law that the vote of the fourth ward of the city of Springfield should be entirely thrown out. If this were done, then even if the entire contention of the contestant as set forth in his brief were granted, the contestant would have only 20,093 votes, whereas the contestee would be entitled to 20,127 votes and would still be elected by a plurality of 34 votes.

If, however, we take the facts as to the correct returns of the election as found by the committee in this report and then throw out the entire vote of the fourth ward of the city of Springfield in accordance with the law and the precedents of Congress, it would make the total vote of the contestee, Sam C. Major, 20,169 and the total vote of James D. Salts, the contestant, 20,048, which would give the contestee a plurality of 121 votes over the contestant.

In conformity with its findings on the various questions presented, the committee amended the total returns, giving Sam C. Major 20,310 votes and James D. Salts 20,254 votes, a plurality of 56 votes for the sitting Member. The committee therefore unanimously reported resolutions declaring the contestant was not elected and that the sitting Member was elected, and confirming his title to the seat.

The case was briefly debated on May 18, 1920,[1] and, after a perfunctory explanation by Mr. Dallinger, the resolutions reported by the committee were agreed to without division.

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[1] Journal, p. 412; Record, p. 7231